87-1235

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ORESTE ABBAMONTE, JR.,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD B. MAZER
DAVID A. NICKERSON
Law Offices of
RICHARD B. MAZER
2120 Greenwich Street
San Francisco, CA 94123
Telephone: (415) 931-1900
Attorneys for Petitioner
Oreste Abbamonte, Jr.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTION PRESENTED

DOES THE USE OF A PRIOR CONSPIRACY CONVICTION TO ESTABLISH THE IN CONCERT ELEMENT OF A CONTINUING CRIMINAL ENTERPRISE OFFENSE VIOLATE THE DOUBLE JEOPARDY CLAUSE?

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Oreste Abbamonte, Junior, the petitioner in the above-captioned case, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on October 7, 1987.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Second Circuit was filed on October 7, 1987 and is reported as *United States v. Amen, et al.*, 831 F.2d 373 (2nd Cir. 1987). A copy of said opinion is attached hereto as Appendix "A". Petitioner's timely Petition for Rehearing and Suggestion For Rehearing En Banc was denied by order of the Court on November 30, 1987. A copy of said order denying rehearing appears herein as Appendix "B".

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Fifth Amendment; and

2. 21 U.S.C. section 846; and

3. 21 U.S.C. section 848.

The relevant statutory provisions are set forth in Appendix C, of this Petition.

STATEMENT OF THE CASE

On May 26, 1986, petitioner and others were charged by Superseding Indictment with various violations of Title 21, United States Code, the federal drug laws. The principal and most serious of these accusations was that petitioner had violated the Continuing Criminal Enterprise Statute, 21 U.S.C. section 848.

Petitioner's trial began on November 12, 1986 and ended on December 9, 1986. The jury found petitioner guilty of the Continuing Criminal Enterprise violation, a conspiracy violation and two substantive narcotic violations. On January 15, 1987, petitioner was sentenced to life imprisonment on the Continuing Criminal Enterprise violation and concurrent forty year prison terms on each of the other violations.

Before and during trial, petitioner argued that the government could not use the fact of, and the facts underlying, petitioner's 1982-1983 conspiracy conviction under 21 U.S.C. section 846 to establish the "in concert" element of the Continuing Criminal

Enterprise violation alleged in the 1986 indictment.[1] The district court rejected petitioner's arguments. As a result, at petitioner's trial on the Continuing Criminal Enterprise violation, the government introduced considerable evidence that petitioner had participated in, and had been found guilty of, a narcotics conspiracy in 1982-1983. Specifically, testimony was introduced concerning several alleged narcotic transactions and the fact that petitioner had plead guilty to a conspiracy to distribute heroin violation, 21 U.S.C. section 846, in 1983.

In its closing argument to the jury, the government argued that the evidence admitted at trial concerning the conspiracy which occurred in 1982-1983 should be considered by the jury in determining whether petitioner had acted in concert with five or more persons, a necessary element of the Continuing Criminal Enterprise violation alleged in the 1986 indictment. The district court rejected jury instructions proffered by petitioner which would have instructed the jury that it could not consider the fact of, or the facts underlying, petitioner's 1982-1983 conspiracy conviction in determining the Continuing Criminal Enterprise violation alleged in 1986 indictment.

On appeal before the United States Court of Appeals for the Second Circuit, petitioner argued that the Double Jeopardy

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[1] To establish a Continuing Criminal Enterprise offense pursuant to 21 U.S.C. section 848(b), the government must show:

(1) a felony violation of the federal narcotics laws;
(2) as part of the continuing series of violations;
(3) in concert with five or more persons;
(4) for whom the defendant is an organizer or supervisor;
(5) from which he derives substantial income or resources.

United States v. Schuster, 769 F.2d 337, 340 (6th Cir. 1985); *United States v. Sterling*, 742 F.2d 521, 525-526 (9th Cir. 1984). As used in this Petition, reference to the "in concert" element of a Continuing Criminal Enterprise offense is to the requirement that the government prove that the defendant acted in concert with five or more persons with respect to whom he occupied a position of manager, organizer or supervisor.

Clause prohibited the government from using the fact of petitioner's 1983 conspiracy conviction, and the facts underlying that conviction, to establish the in concert element of the Continuing Criminal Enterprise violation. The Second Circuit concluded to the contrary, stating in its opinion that "the district court properly admitted (the) facts underlying Abbamonte's 1983 conspiracy and substantive narcotics convictions and correctly instructed the jury on its use." *United States v. Amen, et al., supra*, 831 F.2d at 380.

REASONS FOR GRANTING THE WRIT

The Decision Of The Second Circuit Court Of Appeals Is In Direct Conflict With The Decision Of The Fifth And Eleventh Circuit Courts Of Appeals On This Important Issue Of Constitutional Law.

In its published opinion in petitioner's case the Second Circuit Court of Appeals concluded the "historical evidence" relating to petitioner's 1983 conspiracy conviction was properly admitted at trial to establish that petitioner had acted in concert with and organized, supervised, or managed five or more persons, a necessary element of the Continuing Criminal Enterprise violation. *United States v. Amen, et al., supra*, 831 F.2d at 380. In reaching this conclusion, the Second Circuit expressly rejected petitioner's contention that "use of that prior conspiracy conviction or the facts underlying it in a later prosecution for operating a CCE violates the double jeopardy clause of the Fifth Amendment". *United States v. Amen, et al., supra*, 831 F.2d at 380.

The Second Circuit's holding on this issue is in direct conflict with previous rulings of both the Fifth and Eleventh Circuit Courts of Appeal. The Fifth Circuit, in *United States v. Stricklin*, 591 F.2d 1112, 1123 (5th Cir. 1979) concluded that:

> . . . section 846 is a lesser included offense of section 848 where the agreement and transactions involved in the two cases are the same. A double jeopardy defense will lie where the government has previously prosecuted a defendant under either section 846 or section 848 and then seeks to prosecute

> him again on the basis of the same criminal agreement under the other statute.

The issue in *Stricklin* arose by way of an appeal prior to trial. In 1974, Stricklin had been indicted and convicted in the District of New Mexico for conspiracy to possess marijuana. In 1977, Stricklin was indicted in the Western District of Texas for conspiracy to possess, import and distribute marijuana and for operating a Continuing Criminal Enterprise. The indictment charged Stricklin with operating a Continuing Criminal Enterprise by virtue of his status as a conspirator in various agreements to possess and distribute marijuana, including the agreement underlying his 1974 conspiracy conviction in New Mexico. Because of the "overlap" of the New Mexico conspiracy into the Texas Continuing Criminal Enterprise charge, the Fifth Circuit concluded:

> Stricklin has thus made out a prima facie case that the possession conspiracy and transactions for which he was convicted in New Mexico and which are alluded to in the Magdelena portions of the original Texas indictment may not be used to show the "in concert" element of the section 848 offense. *Id.*, at 591 F.2d 1124.

Stricklin therefore stands for the principle that when a defendant has been convicted of a section 846 conspiracy and is subsequently charged with operating a Continuing Criminal Enterprise, the Double Jeopardy Clause bars the use of the conspiracy conviction to establish the "in concert with five or more persons" element of the Continuing Criminal Enterprise offense.

In *United States v. Boldin*, 772 F.2d 719, 731 (11th Cir. 1985), the Eleventh Circuit applied the *Stricklin* holding to post-trial appellate review. *Boldin*, citing *Stricklin*, concluded simply that a prior "section 846 (conviction) . . . cannot be used by the government in the present prosecution to satisfy the collaboration requirement of section 848." *United States v. Boldin, supra*, 772 F.2d at 731. See also, *United States v. Stratton*, 583 F.Supp. 1234, 1240 (S.D.N.Y. 1984).

Petitioner's case was nearly identical to the situations present in *Stricklin* and *Boldin*. At petitioner's trial the government relitigated every aspect of petitioner's 1982-1983 conspiracy conviction

despite the fact that petitioner had already been tried, convicted and sentenced for that offense. The government did so for the sole purpose of establishing the in concert element of the Continuing Criminal Enterprise violation. The holdings of both *Stricklin* and *Boldin* make clear that such use of a previous conspiracy conviction is prohibited by the Double Jeopardy Clause. The Second Circuit's holding to the contrary in petitioner's case is in direct conflict with the Fifth Circuit in *Stricklin* and the Eleventh Circuit in *Boldin*. This Court must resolve this conflict between the Circuit Courts of Appeals.

This Court has addressed the Continuing Criminal Enterprise statute in the Double Jeopardy context on two occasions. In *Garrett v. United States*, ____ U.S. ____, 105 S.Ct. 2407 (1985), this Court concluded that a prior conviction for a *substantive* narcotics offense, such as the importation of marijuana in violation of 21 U.S.C. sections 952 and 960 which was at issue in *Garrett* itself, could be used to establish the predicate offense element of a Continuing Criminal Enterprise offense without violating the Double Jeopardy Clause. *Garrett v. United States*, *supra*, 105 S.Ct. at 2419. Simply put, the Court determined that the predicate offense element of a Continuing Criminal Enterprise offense was not "the same offense" for Double Jeopardy purposes as a prior substantive narcotics offense. The analysis in the *Garrett* opinion was limited, however, to the relation between a substantive narcotic offense and the predicate offense element of a Continuing Criminal Enterprise. It did not address the relation between a substantive narcotic offense and the in concert element of a Continuing Criminal Enterprise or the relation between a prior conspiracy conviction and the in concert element of a Continuing Criminal Enterprise.

Furthermore, *Garrett* expressly reaffirmed *Jeffers v. United States*, 432 U.S. 137 (1977). Two important points were raised in *Jeffers*. First, this Court concluded that a conspiracy offense pursuant to 21 U.S.C. section 846 is a lesser included offense of a Continuing Criminal Enterprise. Secondly, the Court noted, but did not decide, the Double Jeopardy implications of a Continuing Criminal Enterprise prosecution following a conspiracy conviction where the conspiracy is alleged as being an element of the

Continuing Criminal Enterprise violation. Citing *Brown v. Ohio*, 432 U.S. 161 (1977), decided the same day, the Court in *Jeffers v. United States, supra*, 432 U.S. at 151 fn. 17, noted generally:

> It is also possible to argue that a second trial on a greater offense is prohibited by the Double Jeopardy Clause because the defendant is necessarily placed twice in jeopardy on the lesser offense. The risk of conviction on the greater means nothing more than a risk of conviction upon proof of all the elements of the lesser plus proof of the additional elements needed for the greater. *Brown v. Ohio*, 432 U.S. 161, 167 n. 6, (1977), leaves consideration of the implication of this theory for another day.

Thus, expressly left unresolved in *Jeffers* is whether the government can utilize a previous conspiracy conviction in establishing the in concert element of the Continuing Criminal Enterprise offense. That issue is presented squarely in petitioner's case.

This Court should grant the instant Petition in order to resolve the conflict which now exists between the circuits on this important issue of law.

CONCLUSION

For the foregoing reasons, the instant Petition for a Writ of Certiorari should be granted.

Dated: January 13, 1988

Respectfully submitted,

RICHARD B. MAZER
DAVID A. NICKERSON
Law Offices of
RICHARD B. MAZER
2120 Greenwich Street
San Francisco, CA 94123
Attorneys for Petitioner
Oreste Abbamonte, Jr.

(Appendices Follow)

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1167, 1120, 1168, 1169—August Term, 1986

(Argued June 15, 1987 Decided October 7, 1987)

Docket Nos. 87-1028, -1034, -1040, -1049

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANGELO AMEN, MARK A. DELEONARDIS, MICHAEL PARADISO and ORESTE ABBAMONTE, JR.,

Appellants.

B e f o r e :

OAKES, MESKILL, and PRATT,

Circuit Judges.

Appeals from judgments of conviction entered in the United States District Court for the Southern District of New York, Robert L. Carter, *Judge*. *Held*, taping of

telephone calls was impliedly consented to by prison inmates on notice of monitoring and hence within consent exception to Title III of the Omnibus Crime Control and Safe Streets Act; destruction of 27 out of 253 tapes not prejudicial where done negligently; evidence of earlier substantive count convictions admissible to show direction of fifth person so as to make evidence of continuing criminal enterprise ("CCE") sufficient; one cannot aid and abet a CCE; sentencing claims lacking in merit except that a conspiracy conviction is "combined" into a CCE conviction.

Affirmed in part, reversed in part.

LAWRENCE H. SCHOENBACH, New York, NY *for Appellant Amen.*

MICHAEL P. JOSEPH, New York, NY (Joseph & Stalonas, New York, NY, of counsel), *for Appellant Deleonardis.*

JOHN L. POLLOK, New York, NY (Todtman, Hoffman, Epstein, Young, Goldstein, Tunick & Pollok, P.C., Charles L. Weintraub, New York, NY, of counsel), *for Appellant Paradiso.*

RICHARD B. MAZER, San Francisco, CA (Law Offices of Richard Mazer, David A. Nickerson, of counsel), *for Appellant Abbamonte, Jr.*

ANNMARIE LEVINS, Assistant United States Attorney (Rudolph W. Giuliani, United

States Attorney for the Southern District of New York, Steven A. Standiford, Kenneth Roth, Assistant United States Attorneys, of counsel), *for Appellee.*

OAKES, *Circuit Judge*:

Angelo Amen, Mark Deleonardis, Michael Paradiso, and Oreste Abbamonte, Jr., four of fourteen original defendants in a twenty-three count indictment, appeal convictions entered in the United States District Court for the Southern District of New York, Robert L. Carter, Judge. Following denial of their suppression (and certain other) motions in *United States v. Vasta*, 649 F. Supp. 974 (S.D.N.Y. 1986), appellants Amen and Deleonardis pleaded guilty to all the counts in which they were named, including Count One, alleging a conspiracy to distribute and possess with intent to distribute heroin in violation of 21 U.S.C. § 846 and Counts Five through Ten and Counts Six through Nine respectively charging Deleonardis and Amen with distributing heroin. Abbamonte, Paradiso, and six other codefendants were convicted after a jury trial, Abbamonte of Count One, the conspiracy count, Count Three, operating a continuing criminal enterprise in violation of 21 U.S.C. § 848, and Counts Seven and Eight, distributing heroin. Paradiso was convicted on Counts One and Four, Count Four charging aiding and abetting Abbamonte in the operation of his continuing criminal enterprise in violation of 21 U.S.C. § 848 and 18 U.S.C. § 2.

On January 14, 1987, Judge Carter sentenced Amen to a twenty-year prison term on Count One, to run consecutively to a nine-year prison term imposed by David N. Edelstein, United States District Judge, on July 22, 1986, for Amen's conviction in *United States v. Delvecchio and Amen*, 86 Cr. 305 (S.D.N.Y.), *aff'd in part, rev'd in part*, 816 F.2d 859 (2d Cir. 1987). In addition, Judge Carter sentenced Amen to concurrent twenty-year terms on Counts Seven and Eight. On the same day, Judge Carter sentenced Mark Deleonardis to a twenty-year prison term on Count One, a consecutive five-year prison term on Count Six, and concurrent twenty-year prison terms on each of Counts Five, Seven, Eight, Nine, and Ten. Judge Carter also imposed lifetime special parole on Deleonardis.

On January 15, 1987, Judge Carter sentenced Abbamonte to life imprisonment on Count Three and imposed concurrent forty-year prison terms on each of Counts One, Seven, and Eight. In an endorsement dated January 16, 1987, Judge Carter corrected the judgment to reflect his intention to impose the sentence on Count One consecutive to the term that Abbamonte was already serving for 1983 narcotics convictions. On January 15, 1987, Paradiso received consecutive twenty-year prison sentences on Counts One and Four.

The evidence establishing a heroin enterprise run from the federal penitentiary at Lewisburg, Pennsylvania, consisted primarily of communications taped under the prison monitoring system. Paradiso and Abbamonte argue that the trial court improperly denied their motion to suppress these tapes (hereinafter the "Lewisburg tapes"). Abbamonte argues that there was insufficient evidence to establish that he operated a continuing criminal enterprise

because the Government failed to establish that he acted in concert with five or more persons with respect to whom he occupied the position of organizer, supervisor, or manager. He contends that the only properly admitted evidence related to four such persons. Paradiso argues that he should not have been convicted for aiding and abetting Abbamonte's continuing criminal enterprise because (A) he was not chargeable with such an offense, (B) the court's instruction on aiding and abetting was erroneous, and (C) the evidence was insufficient to prove that he aided and abetted Abbamonte in the management and operation of a continuing criminal enterprise. Abbamonte also argues that he was denied effective assistance of counsel by virtue of a denial of a motion for adjournment. Amen and Deleonardis argue that their sentences violate the Eighth Amendment prohibition against cruel and unusual punishment. Abbamonte and Paradiso argue, and the Government concedes, that they should not have been sentenced on Count One, the conspiracy count, unless their respective convictions for operating a continuing criminal enterprise ("CCE") and aiding and abetting such operation are overturned. *United States v. Aiello*, 771 F.2d 621, 632-35 (2d Cir. 1985); *United States v. Osorio Estrada*, 751 F.2d 128, 134-35 (2d Cir. 1984), *cert. denied*, 106 S. Ct. 97 (1985). We affirm as to all appellants except that we reverse the judgment against Paradiso for aiding and abetting Abbamonte's CCE and we "combine" Abbamonte's conviction for conspiracy into the greater offense of CCE in accordance with *Aiello* and *Osorio Estrada*.

FACTS

Although the principal evidence in the case pertains to the Lewisburg heroin enterprise, evidence of Abbamonte's involvement in a supervisory capacity in heroin trafficking in 1982 and 1983 was introduced as proof that he operated a CCE. On October 20, 1982, a Drug Enforcement Administration ("DEA") undercover agent purchased from Abbamonte and Joseph Delvecchio three kilograms of heroin and made arrangements on November 3, 1982, to purchase seventeen more. This resulted in the seizure of nine kilograms and Abbamonte's and Delvecchio's arrest. Both were jailed at the Metropolitan Correction Center ("MCC"). One of Abbamonte's most frequent visitors was Amen and one of Delvecchio's was his brother, Richard. Later Richard also visited Abbamonte. On several occasions, Amen and Richard visited Abbamonte together. In April 1983, another member of the conspiracy, Lorenzo DiChiara, began cooperating with the Government and was released from the MCC. After DiChiara's release, Richard Delvecchio and Amen repeatedly approached him to buy drugs. On May 14, 1983, in the presence of a DEA agent, Delvecchio and Amen expressed a desire to purchase ten kilograms of heroin at $195,000 per kilogram, taking five kilograms on credit. The drug agent, purporting to be the nephew of the supplier of the nine kilograms of heroin which had been seized, claimed that they still owed his uncle money for the seized heroin. Amen argued that his organization, the Abbamonte organization, should be charged only $80,000 per kilogram for the seized heroin but the agent disputed that his uncle had ever agreed to a reduction in price. An agreement was made to purchase five kilograms of heroin for $190,000 each, but the sale never took

place, apparently because Richard Delvecchio and/or Amen suspected surveillance. Eventually, Abbamonte pleaded guilty to two substantive narcotics violations and to conspiracy to distribute heroin. Testimony by undercover and surveillance agents, as well as Abbamonte's guilty plea allocution, established that he supervised, managed, and organized Joseph Delvecchio during the two 1982 heroin transactions with the undercover agent.

The Lewisburg heroin enterprise, as to which there was ample proof, was discovered after a defendant in an unrelated narcotics case began cooperating with the Government. He told a DEA agent that his cousin, Lawrence Jackson, an inmate at the Lewisburg Penitentiary, was coordinating heroin transactions from inside the prison. With the assistance of the cooperating defendant, DEA Special Agent Charles Howard established contact with Jackson; DEA Special Agents Ruth Beaver and Livia Adams, posing as Agent Howard's girlfriends, received telephone calls from Jackson. Sixty-seven tapes made by these three agents were introduced into evidence.

In addition, prison officials made 130 tapes of conversations of Abbamonte and Paradiso with their codefendants. In these tapes, as well as in the Jackson tapes, various codes referred to drug transactions: "lawyers" indicated sources of heroin and "going to court" or similar expressions referred to heroin transactions. Indeed, when one heroin dealer refused to make repeated sales to Agent Howard, Jackson agreed to find him another "lawyer." In December 1984, Jackson promised to put Agent Howard in contact with a source of heroin known as "F. Lee Bailey." The "F. Lee Bailey" source, the evidence indicated, was the organization of appellant Abbamonte.

On January 5, 1985, appellant Mark Deleonardis, acting on instructions from Abbamonte and identifying himself as "your friend from Lewisburg," quoted Agent Howard prices for various amounts of heroin and suggested a meeting. Shortly thereafter, Jackson confirmed that Deleonardis was "F. Lee Bailey." On January 11, 1985, Deleonardis met Agent Howard at a hotel in Queens. Deleonardis indicated that Abbamonte, his "friend at Lewisburg," had told him to provide Agent Howard with "quality heroin." On February 7, 1985, he sold 129 grams of heroin to Agent Howard for $32,500 cash. Three days later, Jackson called Agent Howard to report that "F. Lee Bailey" was pleased with the deal. On February 12, and again on February 20, Deleonardis visited Abbamonte at Lewisburg. On February 14, Agent Howard complained to Jackson about the quality of the heroin he had bought. Jackson indicated that he would talk to "the one that was doing the research on this end." He also agreed to provide samples in the future.

On March 6, 1985, Deleonardis brought a sample of heroin to Agent Howard on a boat owned by the DEA fully equipped with videotape and soundtrack. At this meeting, Deleonardis told Agent Howard that Abbamonte insisted that the next few deals take place in New York rather than in Washington. On March 15, 1985, Deleonardis sold 112 grams of heroin to Agent Howard in New York for $32,500 in cash, the heroin supplied to Deleonardis by appellant Amen at the Skyline Motel in Manhattan. Again, on April 10, 1985, Deleonardis sold Agent Howard 108 grams of heroin supplied by Amen. Deleonardis explained to the agent that his "friend," Abbamonte, had agreed to give Howard heroin on credit, so that for $70,000 cash he could get one-half kilogram or

$140,000 worth of heroin. On May 10, 1985, Deleonardis sold 249 grams of heroin to Agent Howard for $48,000. Appellant Amen, along with codefendant Philip Vasta, whose appeal was withdrawn, supplied the heroin. The next day, Abbamonte called Deleonardis, who assured him that the deal had gone as planned.

The evidence also indicated that Abbamonte was having difficulty controlling Amen. In a series of conversations with Deleonardis and a codefendant, Arnold Squitieri, Abbamonte complained that Amen continued to deal with certain people despite Abbamonte's order that Deleonardis, not Amen, do so. On April 27, 1985, Abbamonte had Deleonardis give him Amen's address and told Deleonardis that Amen was "going to the . . . hospital." A few days later Abbamonte informed Squitieri that Amen was going to get a beating because he refused "to stop." On May 9, 1985, Paradiso called codefendant Richard Romano and gave him Amen's address, telling him to "take care of it" and to make sure he got "Jimmy" to help. During the next few days Romano and others waited outside Amen's apartment building. Apparently he had learned of the plan and gone into hiding.

Another heroin sale was scheduled for August 15, 1985. However, Deleonardis detected surveillance and did not complete the deal. He told Abbamonte that he would no longer deal with Agent Howard. Paradiso called Romano and instructed him to meet with Deleonardis. On the evening of August 15, Abbamonte told Deleonardis that Romano would take care of Agent Howard. On August 16, Deleonardis and Romano visited Abbamonte and Paradiso at Lewisburg. Jackson later called Agent

Howard and said that "another lawyer" from "the same firm" would do business with him.

On September 6, 1986, while Deleonardis waited with Agent Howard, Romano took $150,000 and went to pick up the heroin. After an eight-hour delay, he delivered 451 grams of heroin. He also returned $25,000 because he was not able to get the 1 1/2 kilograms that Agent Howard was expecting. The evidence showed that the heroin was supplied by a person known as "The Curl." On September 10, Deleonardis and Romano visited Abbamonte and Paradiso at Lewisburg.

The Government also introduced evidence seized from various defendants, including heroin, cocaine, $5.6 million, narcotics records, drug paraphernalia, address books, and beepers, as well as testimony pertaining to Vasta's heroin trafficking.

DISCUSSION

1. *Denial of the Motions to Suppress the Lewisburg Tapes*

Abbamonte and Paradiso argue that the district court erred in denying defendants' motion to suppress the Lewisburg tapes. They contend that recording the telephone conversations violated Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-20, and the Fourth Amendment of the United States Constitution. Abbamonte also maintains that the inadvertent destruction of some of the Lewisburg tapes should lead to the suppression of the rest. The Government argues that Title III procedures do not apply to prison conversations and that there is no Fourth Amendment

privacy interest preventing security-motivated interception of telephone conversations made at Lewisburg. The Government also maintains that even if Title III applies to prison communications, under 18 U.S.C. § 2511(2)(c) it is not unlawful for "a person acting under color of law to intercept a wire or oral communication, where . . . one of the parties to the communication has given prior consent to such interception."

Title III clearly applies to prison monitoring. *United States v. Paul*, 614 F.2d 115, 117 (6th Cir.), *cert. denied*, 446 U.S. 941 (1980); *Campiti v. Walonis*, 611 F.2d 387, 392 (1st Cir. 1979); *Crooker v. United States Dep't of Justice*, 497 F. Supp. 500, 502 (D. Conn. 1980); *see also United States v. Figueroa*, 757 F.2d 466, 472 (2d Cir. 1985) (assuming Title III procedures for wiretap orders apply to prison surveillance). However, we agree with the Government that the monitoring in this case fell within the consent exception to Title III.[1] The legislative history shows that Congress intended the consent requirement to be construed broadly. The Senate Report specifically says in relation to section 2511(2)(c): "Consent may be expressed or implied. Surveillance devices in banks or apartment houses for institutional or personal protection would be impliedly consented to." S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. &

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1 The district court concluded that Title III did not apply to the monitoring of inmate conversations at Lewisburg because it was conducted "by an investigative or law enforcement officer in the ordinary course of his duties." 18 U.S.C. § 2510(5)(a)(ii). *United States v. Vasta*, 649 F. Supp. 974, 989 (S.D.N.Y. 1986). We do not pass judgment on the applicability of this exception except so far as to express our reservation that the prison officials monitored the calls in the ordinary course of their duties.

Admin. News 2112, 2182. Indeed, the Senate Report cites a line of cases allowing recording or eavesdropping by government agents or informers who were parties to a conversation or who are allowed to listen by explicit consent of a party to the conversation. *Id.* (citing *Lopez v. United States*, 373 U.S. 427 (1963); *Rathbun v. United States*, 355 U.S. 107 (1957); *On Lee v. United States*, 343 U.S. 747 (1952)).

Here we imply consent in fact from surrounding circumstances indicating that the appellants knowingly agreed to the surveillance. *See United States v. Rantz*, No. 85-40036-04, slip op. at 9 (D. Kan. Sept. 30, 1985) (available on WESTLAW, DCT database); *but see Watkins v. L. M. Berry & Co.*, 704 F.2d 577, 581 (11th Cir. 1983) (use of telephone with knowledge of capability of monitoring not implied consent where participant told personal calls not monitored except to extent necessary to determine whether call is personal or business); *Campiti v. Walonis*, 611 F.2d at 393-94 (use of telephone did not constitute implied consent where participants unaware that call was monitored and no regulations or notices informed inmates that calls might be monitored); *Jandak v. Village of Brookfield*, 520 F. Supp. 815, 820 n.5 (N.D. Ill. 1981) (consent cannot be implied in law where participant did not but reasonably should have known that line was monitored); *Crooker v. United States Dep't of Justice*, 497 F. Supp. at 503 (knowledge of monitoring not sufficient to establish consent).

Paradiso and Abbamonte impliedly consented to the interception of their telephone calls by use of the prison telephones. They were on notice of the prison's interception policy from at least four sources. The Code of

Federal Regulations[2] provides public notice of the possibility of monitoring. In addition, inmates receive actual notice. First, upon first arriving at Lewisburg and upon returning to the institution after an absence of nine months or more, each inmate must attend an admission and orientation lecture in which the monitoring and taping system is discussed. Second, every inmate at Lewisburg receives a copy of *The Inmate Informational Handbook* which as of September 1984 contained the following notice about the taping system:

> Telephones at the United States Penitentiary, Lewisburg are located in each housing unit and are turned on every other day on a rotating basis. The phones are in operation Monday through Friday from 8:30 AM until 11:15 PM, excluding counts; on weekends and holidays from 8:15 AM until 11:15 PM, excluding counts. These phones utilized by the inmates are MONITORED and TAPED as well as having the capibility [sic] for VISUAL TAPING.

Handbook at 9 (Sept. 1984 ed.) (capitalization in original). Third, notices were placed on each telephone, stating in English and Spanish the following:

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2 28 C.F.R. § 540.100 provides:

> Inmate telephone use is subject to limitations and restrictions which the Warden determines are necessary to insure the security, good order, and discipline of the institution and to protect the public. The Warden shall establish procedures and facilities for inmate telephone use.

28 C.F.R. § 540.101 provides:

> The Warden shall establish procedures that enable monitoring of telephone conversations on any telephone located within the institution, said monitoring to be done to preserve the security and orderly management of the institution and to protect the public. The Warden must provide notice to the inmate of the potential for monitoring.

NOTICE

> The Bureau of Prisons reserves the authority to monitor conversations on this telephone. Your use of institutional telephones constitutes consent to this monitoring. A properly placed telephone call to an attorney is not monitored.

See Figueroa, 757 F.2d at 472, 474 (sign over telephone notified prisoners that calls might be monitored).

Evidence indicated appellants received actual notice of the monitoring and taping process. When Abbamonte returned to Lewisburg on October 16, 1984, after being incarcerated at Danbury, he attended an admissions and orientation lecture and received a copy of *The Inmate Informational Handbook*. Moreover, prison records indicate that on October 8, 1984, Paradiso's case manager presented him with a form containing the written notice of the monitoring and taping system, which Paradiso refused to sign.

Thus, the district court properly found that the two defendants had notice of the interception system and that their use of the telephones therefore constituted implied consent to the monitoring. *United States v. Vasta*, 649 F. Supp. at 990 n.2.

Appellants' argument that taping their conversations violated the Fourth Amendment is also not compelling. As the Supreme Court construes the Fourth Amendment, prison inmates have no reasonable expectation of privacy. *See Hudson v. Palmer*, 468 U.S. 517, 527-28 (1984); *United States v. Cohen*, 796 F.2d 20, 22-23 (2d Cir.), *cert. denied*, 107 S. Ct. 189 (1986). In the prison context the reasonableness of a search is directly related to legitimate concerns for institutional security. *See Block v. Ruther-*

ford, 468 U.S. 576, 588 (1984); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). If security concerns can justify strip and body-cavity searches, *see Bell v. Wolfish*, 441 U.S. at 558-60; *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986), and wholly random cell searches, *see Block v. Rutherford*, 468 U.S. at 589-91; *Hudson v. Palmer*, 468 U.S. at 530, then surely it is reasonable to monitor prisoners' telephone conversations, particularly where they are told that the conversations are being monitored. *See United States v. Roy*, 734 F.2d 108, 111 (2d Cir. 1984), *cert. denied*, 106 S. Ct. 1520 (1986) (legitimate privacy expectations "severely curtailed" during incarceration); *Christman v. Skinner*, 468 F.2d 723, 726 (2d Cir. 1972) (monitoring detainees' conversation with visitors not violative of privacy right).

Nor was the district court in error when it held that sanctions should not be imposed on the Government because a government agent inadvertently destroyed twenty-seven of the approximately 253 Lewisburg tapes. The district court's finding of negligence, as opposed to wilfulness, is fully supported by the record. When pursuant to subpoena prison officials turned over approximately 253 tapes, a DEA agent provided the officials with blank replacement tapes. When the replacement tapes proved defective, the agent returned twenty-seven of the original tapes produced under but not covered by the subpoena. The Government concedes that at least some of the twenty-seven returned tapes probably contained conversations involving appellants and thus were subject to discovery under Federal Rule of Criminal Procedure 16(a)(1)(A). The appropriateness and extent of sanctions therefore depends, as we held in *United States v. Grammatikos*, 633 F.2d 1013 (2d Cir. 1980), "upon a case-by-

case assessment of the government's culpability for the loss, together with a realistic appraisal of its significance when viewed in light of its nature, its bearing upon critical issues in the case and the strength of the government's untainted proof." *Id.* at 1019-20. The district court found that the Government did not act deliberately or in bad faith. *United States v. Vasta*, 649 F. Supp. at 993. Asserting that "it is most difficult for us to imagine how the lost recordings could be helpful to defendants," *id.*, the court found no significant prejudice. We do not quarrel with that finding.

II. *Abbamonte's Continuing Criminal Enterprise*

Abbamonte concedes that the evidence established his supervision of four persons but argues that since the Government did not meet the requirement of 21 U.S.C. § 848 that he acted in concert and organized, supervised, or managed five persons, he must be acquitted of this offense. *See Burks v. United States*, 437 U.S. 1, 16-17 (1978). We agree with the Government, however, that the historical evidence relating to Abbamonte's 1982-83 operations with Joseph Delvecchio satisfies the missing element. Appellant argues that the sole evidence presented by the Government to establish that he acted in concert with and organized, supervised, or managed Joseph Delvecchio, was derived from the facts underlying Abbamonte's 1983 conspiracy conviction and that use of that prior conspiracy conviction or the facts underlying it in a later prosecution for operating a CCE violates the double jeopardy clause of the Fifth Amendment. *See Ohio v. Johnson*, 467 U.S. 493, 501 (1984); *Brown v. Ohio*, 432 U.S. 161, 169 (1977) (double jeopardy forbids successive prosecutions for greater and lesser offense). We agree

with the Government that the district court properly admitted facts underlying Abbamonte's 1983 conspiracy and substantive narcotics convictions and correctly instructed the jury on its use.

Even if the Government were somehow precluded from using the 1983 conspiracy conviction to satisfy the "in concert" element of section 848, it nevertheless could use his 1983 convictions for substantive offenses for this purpose. *United States v. Boldin*, 772 F.2d 719, 731 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1269 (1986). *See also United States v. Stricklin*, 591 F.2d 1112, 1123-24 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979). Any error in admitting the conspiracy conviction was necessarily harmless since evidence that Abbamonte organized, supervised, or managed Joseph Delvecchio during two 1982 heroin transactions also proved two substantive narcotics violations. Moreover, evidence in this case showed that the crimes to which Abbamonte pleaded guilty in 1983 were but a small part of the enterprise that operated from on or about June 1, 1981, to on or about August 26, 1986.

Congress intended CCE to be a separate offense. *Garrett v. United States*, 471 U.S. 773, 784 (1985). Moreover, the double jeopardy clause does not preclude prosecution for both the predicate offenses and the CCE offense, even when prosecution for a CCE offense follows conviction for one of the predicate offenses. *Id.* at 784-86, 793. Congress did not intend to authorize cumulative penalties under the drug conspiracy section, 21 U.S.C. § 846, and the CCE section, 21 U.S.C. § 848, *Jeffers v. United States*, 432 U.S. 137, 157 (1977); *United States v. Mourad*, 729 F.2d 195, 202 (2d Cir.), *cert. denied*, 105 S. Ct. 180 (1984), so that a defendant found guilty of both a

conspiracy and a CCE may not be sentenced more than the maximum authorized by section 848. *United States v. Mourad*, 729 F.2d at 202. However, "[t]he same is not true of the substantive offenses created by the Act and conspiracy, and by the same logic, it is not true of the substantive offenses and CCE." *Garrett v. United States*, 471 U.S. at 794. Since this case involves substantive offenses and a CCE, evidence underlying Abbamonte's 1983 conviction involving his supervision of Delvecchio establishes the missing fifth person thereby permitting prosecution of Abbamonte for CCE.

III. *Aiding and Abetting a Continuing Criminal Enterprise*

Paradiso received consecutive prison sentences of twenty years each for his convictions for conspiracy and for aiding and abetting Abbamonte in the operation of his CCE under 21 U.S.C. § 848. While the Government concedes that employees of a CCE cannot be punished for aiding and abetting the head of the enterprise, *see United States v. Ambrose*, 740 F.2d 505, 507 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 3479 (1985), it insists that non-employees who knowingly provide direct assistance to the head of the organization in supervising and operating the criminal enterprise can be so punished. Paradiso asserts, however, that because section 848 applies only to a person in charge of a CCE, one cannot incur liability for aiding and abetting such a person. We agree with Paradiso.

Congress enacted section 848 as a part of the Comprehensive Drug Abuse Prevention and Contol Act of 1970 to target the ringleaders of large-scale narcotics operations. *United States v. Valenzuela*, 596 F.2d 1361, 1367-68

(9th Cir.), *cert. denied*, 444 U.S. 865 (1979); *United States v. Webster*, 639 F.2d 174, 180 (4th Cir.), *cert. denied*, 454 U.S. 857 (1981). This "carefully crafted prohibition aimed at a special problem . . . . [was] designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers." *Garrett v. United States*, 471 U.S. at 781. When Congress assigns guilt to only one type of participant in a transaction, it intends to leave the others unpunished for the offense. *See Gebardi v. United States*, 287 U.S. 112, 123 (1932) (acquiescing woman not guilty of aiding and abetting Mann Act violation); *United States v. Farrar*, 281 U.S. 624, 634 (1930) (liquor purchaser not guilty of aiding and abetting illegal sale). Here Congress defined the offense as leadership of the enterprise, necessarily excluding those who do not lead.

In its original form, section 848 was primarily a sentencing enhancement provision. H.R. 1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 4566, 4649. If a defendant committed a felony "as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise," the prosecuting attorney could file with the court an instrument specifying that the defendant fell in the category of a special offender thereby instituting special sentencing procedures. *Id.* at 4648-49 (quoting S. 30, 91st Cong., 2d Sess. 1001). However, the original provisions of the CCE section were not in the bill as finally reported. The Association of the Bar of the City of New York and others objected that these provisions allowed sentencing to be imposed without providing a defendant with an opportunity to cross-examine persons providing information as to the

continuing criminal offense. *Id.* at 4650-51. An amendment offered by Representative John D. Dingel and adopted by the Interstate and Foreign Commerce Committee corrected the defects in the original sentencing bill. "Instead of providing a postconviction-presentencing procedure, it made engagement in a continuing criminal enterprise a new and distinct offense with all its elements triable in court." *Id.* at 4651. While the amendment "improved the continuing criminal activity section," *id.* at 4651, several members of the committee cautioned "candor requires that it be pointed out that this section still contains serious objections," including the failure adequately to define a "continuing series of violations," or to explain what is meant by deriving "substantial income or resources." They observed that "the very severe penalty of the continuing criminal enterprise . . . is applicable to a broad range of criminal activities, some of which are very mild." *Id.* at 4651-52. Finally, they worried that mandating a minimum penalty would make it necessary, in the case of a minor offender, either to find him not guilty or to impose a mandatory ten-year sentence. *Id.* at 4652-53.

While the legislative history makes no mention of aiders and abettors, it makes it clear that the purpose of making CCE a new offense rather than leaving it as sentence enhancement was not to catch in the CCE net those who aided and abetted the supervisors' activities, but to correct its possible constitutional defects by making the elements of the CCE triable before a jury.

Not only does the Government's distinction between mere employees and those who otherwise "help" the kingpin lack support in legislative history but it also seems totally unworkable. How does one determine

whether a person is an employee or third party? What of the businessman who leases a boat to a CCE engaged in importation? What about the kingpin's bodyguard? Or his lawyer? Ultimately, a subordinate may have all the attributes of a third party and render even greater assistance to the kingpin, yet escape enhanced criminal responsibility because it depends solely on the degree of control exercised by the kingpin over the individual. Normally we would assume that in enacting a later statute (section 848) Congress had the earlier one (section 2) in mind and we would reconcile the two if we could, but we do not believe it possible to do so here and still remain faithful to the plain terms and clear intent of section 848.

Thus, we believe that to be punished under section 848 one must meet all the requirements for a conviction under section 848. The Government did not establish these requirements in Paradiso's case. Consequently, we reverse his Count Four conviction.

IV. *Amen's Sentence*

Amen pleaded guilty to one count of conspiracy to possess and distribute heroin and two substantive counts of possession and distribution. He was sentenced to concurrent twenty-year terms on each count to run consecutively to a nine-year term previously imposed on him for conspiracy and distribution of heroin in the earlier incident involving Abbamonte and others. Amen argues that imposition of the maximum sentence of twenty years was arbitrary and capricious in light of his guilty plea and his status as a "lesser member of the conspiracy." He also argues that it was "excessive" to make his twenty-year terms consecutive to his previous nine-year term which he claims arose out of the same factual conspiracy. Both of

these claims are meritless. Indeed the Government is correct that the court omitted to impose an additional three-year special parole term in violation of 21 U.S.C. § 841(b)(1)(B).

Amen's only real objection is to Judge Carter's statement that: "I suppose that it's unfortunate that all of you are before a judge who finds the plague that narcotics has caused to people and families and neighbors intolerable." While this statement clearly indicates Judge Carter's predisposition to sentence narcotics offenders heavily, the statute gives him this latitude. Moreover, he made the statement in the context of determining the weight to be given the personal remorse expressed by the defendants who, after all, were engaged in large-scale heroin purchases and sales over a long period of time. The case is thus distinguishable from *United States v. Wardlaw*, 576 F.2d 932, 936-38 (1st Cir. 1978), where a judge imposed a large sentence on a first-time drug carrier primarily because of its presumed effect on large-scale drug smugglers.

As to the imposition of consecutive sentences, this case does not contain the "extraordinary set of circumstances" necessary to demonstrate that consecutive sentences are cruel and unusual. *See United States v. Golomb*, 754 F.2d 86, 90 (2d Cir. 1985). Although Amen's prior conviction also involved business with Abbamonte, the time periods and membership of the two conspiracies as charged in the indictment were distinct.

V. *Mark Deleonardis' Sentence*

Deleonardis pleaded guilty to one count of conspiracy under 21 U.S.C. § 846, and six counts of distribution and possession with intent to distribute. He was sentenced to

twenty years on Count One, an additional five years on Count Six, twenty years each on Counts Seven through Ten concurrently with Count One, a fine of $350, and lifetime parole. He now argues that this sentence violates the Eighth Amendment, citing *Solem v. Helm*, 463 U.S. 277 (1983), and quoting statistics regarding average sentences in the Southern District of New York and elsewhere. The evidence Deleonardis presents is similar to that in *United States v. Ortiz*, 742 F.2d 712 (2d Cir.), *cert. denied*, 469 U.S. 1075 (1984), where we upheld a ten-year prison term plus ten-year parole sentence for conviction of a single count of possession of heroin with intent to distribute. Even without considering the statistical evidence, Deleonardis' total twenty-five year sentence for seven separate counts seems eminently reasonable in comparison to *Ortiz* and some of the cases cited therein. *Ortiz*, 742 F.2d at 717. Unpersuaded by Deleonardis' Eighth Amendment argument, we affirm his sentence.

VI. *Other Issues*

Abbamonte argues that he was denied effective assistance of counsel because the district court denied his motion for adjournment. He contends that this deprived counsel of adequate time to prepare for trial and, in particular, to review the tape recordings. We disagree.

The trial judge has broad discretion in deciding whether to grant a continuance. *Morris v. Slappy*, 461 U.S. 1, 11 (1983). Only an "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Id.* at 11-12 (citing *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)).

That is not this case. Judge Carter exercised sound discretion in denying Abbamonte's motion for adjournment. The Government provided Abbamonte with tapes of the conversations it intended to use at trial and with adequate access to the original Lewisburg tapes. The trial record demonstrates that Abbamonte received the effective assistance of counsel.

Finally, Abbamonte and Paradiso argue, and the Government concedes, that they should not have been sentenced on Count One, the conspiracy count, unless their respective convictions for operating a CCE and aiding and abetting such operation are overturned. We agree. Thus, in accordance with *United States v. Aiello*, 771 F.2d 621 (2d Cir. 1985); *United States v. Osorio Estrada*, 751 F.2d 128 (2d Cir. 1984), *cert. denied*, 106 S. Ct. 97 (1985), we "combine" Abbamonte's conviction for conspiracy into the greater offense of CCE. Since Paradiso's aiding and abetting conviction is reversed, however, his conspiracy conviction and sentence therefor stand.

Judgment in accordance with opinion.

APPENDIX "B"

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30 day of November, one thousand nine hundred and eighty-seven.

United States Court of Appeals
For the Second Circuit

No. 87-1028(L),
87-1049

United States of America,
Appellee,

v.

Angelo Amen, Oreste Abbamonte, Jr., et al.,
Defendants-Appellants.

ORDER DENYING PETITION FOR HEARING

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-Appellant, Oreste Abbamonte, Jr.

Upon consideration by the panel that heard the panel, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH,
Clerk

APPENDIX "C"

STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V—

DOUBLE JEOPARDY CLAUSE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

UNITED STATES CODE

21 U.S.C. section 846. Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. section 848. Continuing Criminal Enterprise

(a) *Penalties; forfeitures.* Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture

prescribed in section 853 of this title.

(b) *Continuing Criminal Enterprise Defined.* For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

No. 87-1235

In the Supreme Court of the United States

OCTOBER TERM, 1987

ORESTE ABBAMONTE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
GEOFFREY R. BRIGHAM
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether evidence underlying a prior conviction for conspiracy to engage in a narcotics offense, in violation of 21 U.S.C. 846, may be introduced in a subsequent prosecution to establish the "in concert" element of the offense of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 831 F.2d 373.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1987, and a petition for rehearing was denied on November 30, 1987 (Pet. App. A25). The petition for a writ of certiorari was filed on January 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of operating a continuing criminal en-

terprise (CCE), in violation of 21 U.S.C. 848; one count of conspiring to distribute heroin and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846; and two counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to life imprisonment on the CCE charge and concurrent terms of 40 years' imprisonment on each of the other charges.

1. The evidence adduced at trial, as summarized in the opinion of the court of appeals (Pet. App. A6-A10), showed that petitioner supervised a large drug trafficking enterprise. On October 20, 1982, a Drug Enforcement Administration (DEA) undercover agent purchased three kilograms of heroin from petitioner and Joseph Delvecchio; the agent subsequently made arrangements to buy 17 more kilograms. Those arrangements led to the arrest of petitioner and Delvecchio, and the seizure of nine kilograms of heroin. While petitioner was being detained, following his arrest, in the Metropolitan Correctional Center in Manhattan, he continued to arrange drug transactions, together with Delvecchio and Angelo Amen, Richard Delvecchio, and Lorenzo DiChiara.

In 1983, petitioner was convicted on his guilty plea on a charge of conspiracy to distribute heroin and two substantive narcotics violations. Those convictions were based on petitioner's involvement in the two transactions with the undercover agent as well as his other narcotics activities in 1982 and early 1983, while he was in the Metropolitan Correctional Center. The court below observed that "[t]estimony by undercover and surveillance agents, as well as [petitioner's] guilty plea allocution, established that he supervised, managed, and organized Joseph Delvecchio during the two 1982 heroin transactions with the undercover agent." Pet. App. A7.

Petitioner was imprisoned following his 1983 convictions. The evidence showed that between 1984 and 1986,

while he was incarcerated in the federal penitentiary at Lewisburg, Pennsylvania, petitioner supervised and managed numerous persons in a heroin distribution enterprise. That operation was discovered when a defendant in an unrelated narcotics case informed DEA agents that Lawrence Jackson, a prison inmate, was coordinating heroin transactions from inside the prison. DEA undercover agent Charles Howard established contact with Jackson and, in December 1984, Jackson promised to put Howard in communication with petitioner's organization. In January 1985, acting on instructions from petitioner, Mark Deleonardis quoted heroin prices to Howard; Deleonardis subsequently indicated that petitioner had told him to provide Howard with "quality heroin." On February 7, 1985, Deleonardis sold 129 grams of heroin to Howard. Jackson called Howard three days later to report that Deleonardis was pleased with the deal. On February 14, 1985, Howard complained to Jackson about the quality of the heroin, and Jackson indicated that he would talk to petitioner about the problem. Pet. App. A7-A8.

In March 1985, Deleonardis told Howard that petitioner insisted that the next few heroin deals take place in New York rather than in Washington. Deleonardis subsequently sold heroin to Howard on three separate occasions. After the second transaction, Deleonardis explained that petitioner had agreed to give heroin to Howard on credit. After the third transaction, petitioner placed a call to Deleonardis, who assured petitioner that the deal had gone as planned. Pet. App. A8-A9.

Angelo Amen supplied the heroin that was sold to Howard on those three occasions. During the spring of 1985, however, petitioner expressed dissatisfaction with Amen's performance. In conversations with Deleonardis and Arnold Squitieri, petitioner suggested that Amen

would get a beating and would be "going to the * * * hospital" because he continued to deal with certain individuals despite petitioner's orders not to do so. On May 9, 1985, Michael Paradiso called Richard Romano to "take care of it," and during the next few days Romano and others waited outside Amen's apartment building. Amen did not appear, however, as he had apparently learned of the plan and gone into hiding. Pet. App. A9.

Another sale of heroin to Agent Howard was scheduled for August 15, 1985, but Deleonardis detected surveillance at the time and decided against completing the transaction. Deleonardis subsequently told petitioner that he would no longer deal with Howard. Paradiso then called Romano and instructed him to meet with Deleonardis. On the evening of August 15, petitioner informed Deleonardis that Romano would take care of Howard. Jackson later called Howard and indicated that someone else from petitioner's organization would do business with Howard. On September 6, 1986, while Deleonardis waited with Howard, Romano went to pick up 451 grams of heroin and delivered it to Howard. Pet. App. A9-A10.

2. The court of appeals affirmed petitioner's convictions in pertinent part.[1] In order to prove that petitioner engaged in a continuing criminal enterprise, the government was required to show that petitioner acted in concert with and supervised or managed five or more persons. See 21 U.S.C. 848(b)(2)(A). The court of appeals unanimously rejected petitioner's contention that his conviction should be reversed because the government improperly relied upon the facts underlying petitioner's prior conspiracy

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[1] The court " 'combine[d]' " petitioner's conspiracy conviction into his conviction for engaging in a continuing criminal enterprise (see Pet. App. A24).

conviction in establishing the "in concert" element of the continuing criminal enterprise offense (Pet. App. A16-A18).

The court observed that petitioner had conceded that he supervised four individuals; it found that "the historical evidence relating to [petitioner's] 1982-83 operations with Joseph Delvecchio" provided the proof that he supervised at least five persons (Pet. App. A16). It stated that "[e]ven if the Government were somehow precluded from using the 1983 conspiracy conviction to satisfy the 'in concert' element of section 848, it nevertheless could use his 1983 convictions for substantive offenses for this purpose" (*id.* at A17). The court reached that conclusion because it found that petitioner's substantive narcotics offenses and his CCE violation were separate offenses for purposes of double jeopardy analysis (*id.* at A17-A18).

The court stated that "[a]ny error in admitting the conspiracy conviction was necessarily harmless since evidence that [petitioner] organized, supervised, or managed Joseph Delvecchio during two 1982 heroin transactions also proved two substantive narcotics violations" (Pet. App. A17). The court further stated that "evidence in this case showed that the crimes to which [petitioner] pleaded guilty in 1983 were but a small part of the enterprise that operated from on or about June 1, 1981, to on or about August 26, 1986" (*ibid.*).

ARGUMENT

One element of the offense of engaging in a continuing criminal enterprise is proof that the defendant committed a continuing series of violations of the narcotics laws "in concert with five or more other persons with respect to whom [the defendant] occupies a position of organizer, a supervisory position, or any other position of management" (21 U.S.C. 848(b)(2)(A)). Petitioner's sole claim is

that the facts underlying his 1983 conspiracy conviction were improperly introduced into evidence in the present case to establish the "in concert" element of the CCE charge.

1. As a threshold matter, the issue raised by petitioner is not presented in this case. The court of appeals expressly declined to address the question whether the facts underlying a prior conspiracy conviction may be introduced to establish the "in concert" element in a subsequent CCE prosecution. Petitioner conceded that the evidence adduced at trial showed he acted in concert with four individuals—Mark Deleonardis, Richard Romano, Angelo Amen, and Richard Delvecchio. The court of appeals found that the evidence showed that petitioner also acted in concert with Joseph Delvecchio, but it did not base that conclusion on petitioner's 1983 conspiracy conviction. The court relied instead on the facts underlying petitioner's 1983 convictions for substantive offenses. It stated that "[a]ny error in admitting the conspiracy conviction was necessarily harmless since evidence that [petitioner] organized, supervised, or managed Joseph Delvecchio during two 1982 heroin transactions also proved two substantive narcotics violations" (Pet. App. A17). The court then concluded that "[s]ince this case involves substantive offenses and a CCE, evidence underlying [petitioner's] 1983 conviction involving his supervision of Delvecchio establishes the missing fifth person thereby permitting prosecution of [petitioner] for CCE" (*id.* at A18). Since the court did not decide whether the evidence underlying a prior conspiracy conviction may be admitted in a subsequent CCE prosecution, the legal point that petitioner seeks to raise is not presented in this case.[2]

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[2] Petitioner himself distinguishes (Pet. 6) between a prior substantive conviction and a prior conspiracy conviction. He appears to limit the scope of his argument to the use of evidence underlying a prior conspiracy offense.

Even without any of the proof relating to the 1982-1983 events, there was ample evidence to satisfy the "in concert" requirement, because the jury could have found that petitioner supervised Lawrence Jackson. As the court of appeals' opinion shows (Pet. App. A7-A8), Jackson was one of the key individuals in petitioner's organization. He placed Agent Howard in contact with petitioner's heroin network, and he acted as an intermediary between petitioner and Howard on questions concerning heroin quality and seller contacts. The evidence thus demonstrated that petitioner satisfied the "in concert" element by supervising at least five persons several years after the period covered by the 1983 conspiracy conviction.[3]

2. In any event, petitioner's suggestion that the Double Jeopardy Clause barred the admission into evidence of the facts underlying his 1983 conspiracy conviction is without merit. Petitioner's claim is essentially indistinguishable from the argument rejected by this Court in *Garrett* v. *United States*, 471 U.S. 773 (1985).

Garrett was a CCE prosecution; one element of that offense is proof that the defendant engaged in a "continuing series of [narcotics] violations," commonly termed predicate offenses (21 U.S.C. 848(b)). The defendant in *Garrett* had previously been convicted on a charge of importing marijuana and, as part of its proof of the predicate offenses, the government introduced evidence of the facts underlying that prior conviction. This Court held

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[3] The government's brief in the court of appeals showed that petitioner supervised, managed, or organized other persons as well. Thus, Angelo Meli was actively involved in helping petitioner secure narcotics at the request of Michael Paradiso. And Michael Deleonardis, Jr., the brother of Mark Deleonardis, aided and abetted the sale of heroin and followed petitioner's instructions by passing a message from petitioner to Mark Deleonardis. Gov't C.A. Br. 34-36.

that the introduction of that evidence did not violate the Double Jeopardy Clause. The Court first concluded that CCE is a separate offense from other drug offenses (471 U.S. at 784). It next held that Congress did not intend CCE to be a substitute for other narcotics offenses, and that Congress intended to "permit prosecution for CCE in addition to prosecution for the predicate offenses" (*id.* at 785). Finally, the Court concluded that Congress did not intend that the government be forced to choose between prosecuting a defendant on a predicate offense and lodging a CCE charge against the defendant (*id.* at 785-786):

> ~~[I]n~~ many cases the Government would catch a drug dealer for one offense before it was aware of or had the evidence to make a case for other drug offenses he had committed or in the future would commit. The Government would then be forced to choose between prosecuting the dealer on the offense of which it could prove him guilty or releasing him with the idea that he would continue his drug-dealing activities so that the Government might catch him twice more and then be able to prosecute him on the CCE offense. Such a situation is absurd and clearly not what Congress intended.

Applying these determinations to the facts of *Garrett*, the Court concluded that the Double Jeopardy Clause did not bar introduction of the evidence underlying the prior conviction. The Court observed that the CCE charge alleged a continuing criminal enterprise spanning more than five and one-half years while the drug importation charge related to acts occurring on several single days during two of those years. The Court emphasized that the CCE was alleged to have continued even after the return of the indictment on the importation charge. 471 U.S. at 788-789, 791.

The effect of barring the use of evidence underlying the prior conviction, the Court noted, would be to require the government to defer indicting a defendant on a predicate offense until it was ready to lodge a CCE charge against the defendant. Citing the fact that the CCE continued even after the indictment on the importation charge, the Court refused to tie the government's hands in that manner. As the Court put it, "[o]ne who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting" (471 U.S. at 790).[4]

This case involves the "in concert" element of the CCE offense rather than the predicate violation element, but the rationale of *Garrett* applies equally to either element. Barring the government from using the prior conviction as evidence to prove the "in concert" element would impose a considerable disincentive upon the bringing of narcotics charges prior to indictment on a CCE charge. The government would have to weigh the possibility that, by indicting the defendant on a conspiracy charge, it was giving up any possibility of obtaining a conviction on a CCE charge. In addition, here, as in *Garrett*, the CCE charge included numerous offenses distinct from the 1983 conspiracy conviction; the CCE cannot in any way be seen as based upon the same conspiracy as the 1983 conviction. And, most significantly, the CCE was alleged to have lasted several years after the date upon which petitioner was convicted

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[4] Although *Garrett* itself addressed the use of a prior conviction on a substantive charge as a predicate offense in a subsequent CCE prosecution, the courts of appeals have applied *Garrett* to prior conspiracy convictions, holding that proof of such convictions may be used to satisfy the predicate offense requirement. See, *e.g.*, *United States* v. *Fernandez*, 822 F.2d 382, 384-385 (3d Cir. 1987), cert. denied, No. 87-346 (Nov. 30, 1987); *United States* v. *Young*, 745 F.2d 733, 750 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

on the conspiracy charge. For these reasons, admission of the facts underlying the 1983 conviction did not violate the Double Jeopardy Clause.[5]

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[5] Petitioner contends (Pet. 4-6) that the decision below conflicts with *United States* v. *Stricklin*, 591 F.2d 1112 (5th Cir.), cert. denied, 444 U.S. 963 (1979), and *United States* v. *Boldin*, 772 F.2d 719 (11th Cir. 1985), because the courts in those cases indicated that the facts underlying a prior conspiracy conviction could not be used to establish the "in concert" element of a CCE charge. There is no such conflict because, as we have discussed, the court below did not decide whether the evidence underlying a prior conspiracy conviction may be introduced on that basis; it held that the evidence underlying a prior *substantive* conviction could be used to satisfy the "in concert" requirement. Both *Stricklin* and *Boldin* are expressly limited to prior conspiracy convictions. See 772 F.2d at 731-732; 591 F.2d at 1123. Finally, even if the court below had held that the evidence underlying the prior conspiracy conviction was admissible, there would still be no clear conflict. The opinions in *Stricklin* and *Boldin* indicate that there might not be a double jeopardy violation if the CCE charge were not coterminous with the conspiracy proved in the prior case. 772 F.2d at 731; 591 F.2d at 1123. Here, as we have shown, the CCE was much broader than the conspiracy that resulted in the 1983 conviction. Accordingly, even under the rule discussed in *Stricklin* and *Boldin*, the evidence underlying petitioner's prior conspiracy conviction may have been admissible.

Petitioner also relies (Pet. 6-7) upon *Jeffers* v. *United States*, 432 U.S. 137 (1977). In *Jeffers*, a plurality of this Court found that a defendant in some circumstances may not receive cumulative punishment for a CCE conviction and a drug conspiracy conviction. Petitioner does not argue that *Jeffers* itself holds, or even indicates, that the facts underlying a prior conspiracy conviction may not be used to establish the "in concert" element of a subsequent CCE charge. Because *Jeffers* is limited to the question of cumulative punishment in the context of CCE and conspiracy charges of virtually identical scope, petitioner could not make such an argument. We submit that the Court's analysis in *Garrett* establishes that the prior conspiracy conviction may be used to prove the "in concert" element of the CCE offense, and that nothing in *Jeffers* is to the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
GEOFFREY R. BRIGHAM
Attorney

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